receiver could not have been compelled to join in the returns. The *Fuller* and *Trinity* cases are directly in point. We proceed to consider each of the five reasons:

1. That in the past the parties have joined in consolidated returns. This argument about "past practice" is vitiated by the fallacy that pervades respondent's whole case, failure to recognize that when the returns were filed petitioner and respondent were economic strangers and respondent had new owners (See O. B, p. 121-124).

2. That in prior years there had accumulated credits and carry-overs resulting from the trustees' operations, which would be lost to it unless consolidated returns should be filed. But such alleged credits and carry-overs were not in fact used in the consolidated returns when filed, and petitioner's loss was the sole offset to respondent's income. In any event, the argument has no bearing on the alleged duty of petitioner to give its loss to respondent or on the duty of respondent to pay for the benefits arising from its use of petitioner's loss.

3. That petitioner "had no income and no use for its loss". We have shown that this argument is without merit. One cannot take another's rights or property, merely because the latter cannot use them himself (O.B. 104-116). Moreover, by joining in consolidated returns, one assumes large burdens, including personal liability for all taxes of the group (see O.B. 98). Here, respondent's tax counsel himself felt doubtful that there would be no tax liability until the settlement in 1947 (R. 1459-60). Yet, entertaining this doubt, respondent imposed a potentially large liability on petitioner. These facts negative any duty to join in returns irrespective of whether one has income or not.

4. That petitioner "as parent was under fiduciary duties to its insolvent subsidiary's creditors". Respondent sum-

marizes this argument by saying that there was "an obligation on the Corporation as parent to exercise its management powers in the best interest of the group" (Br. 32). But petitioner had no management powers; it had none since the onset of the bankruptcy in 1935; there was no longer a "group"; petitioner was not a fiduciary to respondent. The argument ignores the unique and distinguishing fact of this case. Respondent's old creditors, having taken ownership from petitioner, had no right also to take its last remaining asset. We answered this argument in our opening brief (O.B. 99-101, 102-103).[6]

5. That as "sole stockholder [petitioner] was required by the Bankruptcy Act so to act as to preserve the estate." This is but a rephrasing of the fourth reason. Petitioner had no such duty because it had no control or management, and "preservation" of the bankrupt estate does not require gifts of property to the bankrupt. Respondent asserts that the reorganization court would have required petitioner to sign the returns and give away its loss gratis. The sole reason assigned for this contention is that a bankruptcy court has the powers of a court of equity (Br. 65). But no basis for the duty which equity would be called on to enforce is stated. Moreover, a bankruptcy court has the

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[6] Respondent argues (Br. p. 88) that under the plan of reorganization the old creditors were not paid in full. This would be irrelevant, even if true (O.B. 102). But the assertion is dubious in fact. Other than the petitioner itself and one wholly-owned subsidiary, both of whom were completely wiped out, the only creditor who did not receive a 100% equivalent was the A. C. James Co. Respondent argues that the new stock issued to the old creditors has not been worth the values assigned by the Plan, namely, $100 for the preferred and $57 and $62 for the common. Evidence of stock quotations offered by respondent in the trial court was excluded (R. 1579-1583). Respondent asks this court to take judicial notice of the quotations. Were such notice permissible, even were the fact relevant, the fact is that the stock has been above the assigned values. As this brief is being written, the common stock is quoted at $64.

# In the Supreme Court of the United States

October Term, 1952

No. 150

Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver,

*Petitioners,*

vs.

Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, The Western Realty Company, The Standard Realty and Development Company and Delta Finance Co., Ltd.,

*Respondents*

## PETITIONER'S REPLY BRIEF

Herman Phleger,
Moses Lasky,
111 Sutter Street,
San Francisco 4, Calif.
Frank C. Nicodemus, Jr.,
44 Wall Street,
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*Of Counsel:*

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powers of a court of equity only within the limits of its bankruptcy jurisdiction. It had no jurisdiction to enter the supposed order (O.B. 96-97). It is ungenerous to the bankruptcy court to suggest that if it had such power, it would exercise it to deprive petitioner of its property without compensation. On the contrary the presumption must be that the bankruptcy court would insist on just treatment for petitioner.

As Judge Fee said below (R. 2241):

> "The reorganization court had power to deny plaintiff participation in the assets of its subsidiary, and, as a result, all but nominal values in the shares in the subsidiary were lost. But plaintiff was not in reorganization itself * * * The reorganization court had no jurisdiction of plaintiff or of these property rights."

He added in a footnote (R. 2252):

> "Callaway *v.* Benton, 336 U.S. 132. The error in this proceeding, therefore, was the failure to reorganize plaintiff also. An illustrative case, where the parent was in reorganization, is reported in a series of opinions as In re Portland Electric Power Co., 97 F. Supp. 857-921. There a consolidated return was filed during the proceedings and the benefits appropriately distributed."[7]

[7] The controlling case on jurisdiction is *Callaway* v. *Benton,* 336 U.S. 132.

Of this case respondent merely says (Br. 66) that it involved the power of the reorganization court over a stranger to the proceedings, and that petitioner here was a party. But petitioner appeared only to present its views in opposition to the Plan of Reorganization. It thereby submitted itself to the jurisdiction of the bankruptcy court only to assert its claims, as stockholder or creditor for cash advances against the debtor, not to give the court jurisdiction over demands which the debtor might

Respondent argues (Br. 70) that petitioner had no right "to bargain" for the use of its loss because the bargaining power would be employed against the reorganization court and that a refusal to make a gift of the use of its loss would be a threat to the court's jurisdiction. But this overlooks the patent distinction just noted.[8]

Repeatedly respondent argues that, if one group member could bargain, all could do so (e. g. Br. 56, 70). But, save for petitioner, the others were still subsidiaries of respondent or of those who desired to use the loss for respondent's benefit. As to them there was still an economic unity. As subsidiaries of respondent they are presumed to act harmoniously with it and for its interests as parent. That is precisely the assumption the law makes in allowing consolidated returns. *Duke Power Co.* v. *Comm.*, 44 F. 2d 543, cer. den. 282 U. S. 903; *Estate of John B. Lewis*, 10 T. C. 1080. But, as regards petitioner, the situation was radically different: the economic unity was severed. Thus once again respondent's arguments are vitiated by its same basic fallacy. Furthermore, petitioner was giving more than consent to the filing of consolidated returns. It gave the loss, which saved the taxes (See footnote 8 below). Respondent's subsidiaries did not.

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assert against it. In the *Callaway* case the litigant, South Western, had appeared in the reorganization proceedings to ask that its lease be adopted by the reorganized debtor (see 336 U. S. 132 at 134 and 135), and it was also a creditor in the proceedings (p. 146). Yet the Court of Appeals said that those facts gave no jurisdiction to the reorganization court to compel it to convey rights to the debtor. *Benton* v. *Callaway*, 165 F. 2d 877, 882. This court agreed. 336 U. S. at 146.

[8] Respondent also misdescribes the subject-matter of a bargain, by referring to it as mere consent to consolidated returns. But it would be more. The tax savings resulted from the conjunction of two elements, (1) joinder by petitioner in consolidated returns, and (2) the use therein of something belonging to petitioner, to-wit, the loss.

### C. Respondent Refuses To Recognize That It Assumed a Fiduciary Relationship to Petitioner and Appropriated Its Loss; That the Benefits Were Not Conferred by Petitioner Either as a Gratuity or by Any Voluntary Act But Were Taken

Respondent contends that retention of the benefits would not be unjust for lack of "some recognized basis—fraud, mistake, duress, undue influence, illegality—for revoking the transfer" to it of petitioner's rights (Br.74). This is not supportable.

Fraud, mistake, and the like are concepts applicable to a voluntary or affirmative act of transfer. Petitioner did not knowingly transfer anything to respondent. The latter simply appropriated a thing of value belonging to petitioner and used it for its own enrichment. The analogies are trespass, conversion and the appropriation by a fiduciary of its cestui's property.

Respondent asserts that "in every windfall situation", wherever one party acquires a windfall, no one else can recover from him (Br. 74). Of course, where A receives an advantage which is unrelated to B, the latter has no right to share in it. There was here no "windfall" in any such sense, for what respondent gained, it gained not as the result of a fortuitous event, but as the direct result of its appropriation of petitioner's rights.[9]

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[9] The cases cited on this point by respondent (Br. 74) do not support it. In *Straube* v. *Bowling Green Gas Co.*, 227 S.W. 2d 666, 360 Mo. 132, plaintiff had paid defendant for gas at the rates fixed by a Public Service Commission and sued for a refund merely because defendant acquired the gas from its own supplier at a legal reduction in the latter's rates. In *Houck* v. *Hubbard Milling Co.*, 167 N. W. 1038, 140 Minn. 186, plaintiff bought wheat from defendant at contract prices and later sued for a refund because defendant had obtained deductions in its own freight rates. The case turned on the construction of the purchase contract. As the court construed that contract, the price at which plaintiff bought wheat was unconnected with defendant's freight rates. *Greek Catholic Congregation* v. *Plummer*, 32 A. 2d 299, 347 Pa. 351, is a case where one

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The failure to distinguish between a case where a plaintiff voluntarily confers benefits and one where the defendant appropriates them is revealed by the argument that a recovery for unjust enrichment may not exceed plaintiff's loss (Br. 75). Respondent invokes the analogy of the discharge of a debt by a surety, who has become such of his own volition, or other purely voluntary discharge by one of another's debt.[10]

The Restatement of Restitution affirms (Section 153, p. 607) that where A by conduct improper toward B has discharged his debt to a third party by the use of B's property or services, B is entitled to restitution, at his election, either of the value of the property or services so used or of the amount of the debt discharged. The rule is the same where A's conduct as respects B is at fault, although not tortious. Restatement, Section 155.

As we have shown (O.B. 77, 104, et seq.), the controlling principle is that "one is entitled to recover for benefit conferred unless he intended to make a gift or acted officiously."

Respondent denies that there was an appropriation of petitioner's rights and asserts that what was done was "routine" (e.g., Br. 14). It could not be routine in view

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party quitclaims to another whatever interest he might have in a parcel of land and a third party, the owner, sues for the consideration. He then sought to recover the payments received by the main contractor from the owner. In *Vanderbilt University* v. *Williams*, 280 S. W. 689, 152 Tenn. 264, neither plaintiff nor defendant had a right to receive rent from a third party, but the third party paid rent to the defendant and plaintiff sought a share.

[10] If the debt is discharged by money payment of less than the face amount, the person discharging it recovers what he paid, and if the debt is discharged with property instead of money he is entitled to its value. These illustrations cast no light on how to determine the value of what is paid. If what is paid is cash, its value is simple to ascertain. If it is not cash, another question arises. Petitioner's loss had a value equal to the benefit conferred, the full amount of the tax savings.

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of the basic fact of the severance of the economic unity, the paradoxical nature of what was sought, the fact that it was a newly enacted statute that made it possible and that the right or property taken had a use value of $17 million and was the sole asset of petitioner. "Routine" did not justify respondent's failure to discuss the matter openly with independent representatives of petitioner or advise it of its rights.

It may be that respondent and its officers and attorneys were conscious of no wrong-doing, because they believed, as its brief insists, that petitioner had no rights and was under a duty to join in the returns and to give the use of the loss to respondent gratis. But it was not for respondent to decide these rights or duties unilaterally. It argues that equity does not countenance hard bargains, but taking advantage of its relationship to petitioner and its control of petitioner's president respondent gave petitioner no opportunity to "bargain" at all. It simply elected unilaterally to take everything for itself.

However convinced respondent may have been that it was acting within its rights, it acted at its peril when it made its unilateral decision in its own favor. It was in error as to its rights, and it therefore must account for the full benefit obtained. Cf. *Mosser* v. *Darrow*, 341 U. S. 267.

#### Respondent's Statement of Facts Ignores the Trial Court's Findings

On the manner in which the tax returns were handled, respondent's statement of facts ignores the findings in major respects. For example, it is asserted that the effective decisions to file consolidated returns, using petitioner's loss, were made by petitioner "when it filed the returns" (Br. pp. 17, 22).

## Statutes and Regulations



## Texts

But tax counsel, Mr. Polk, testified that "The decisions to file the returns were, of course, made by the company [respondent]" (R. 1450).[11] And, as we have shown (O.B. 28-30) the trial court found that respondent's tax attorneys conceived the idea, decided that they would file the returns, caused them to be filed, and made the settlement with the government (R. 261, 262, 265, 266). The court stated that "there is no question" but that the matter was "conducted by the defendant and its tax counsel, not by the plaintiff" (R. 468), and that "there is a preponderance of evidence in favor of plaintiff's contention" (R. 264, 272) that:

> defendant through its officers and attorneys had controlled * * * plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated returns for the benefit of the defendant"[12]

Respondent's discussion treats petitioner's president, Mr. Curry, as if he were petitioner, or as if his capacity were only that of an officer of petitioner, when in fact he received no compensation at all from it, was in respondent's employ, in its pay, and his principal work was for it.[13]

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[11] So also:

"Q. Who made the decision?

"A. Mr. Elsey, Mr. De Graff [respondent's president and auditor]" (R. 1448).

[12] The court was following the language of the Supplemental Complaint. Respondent asserts (Br. 116) that petitioner "has no standing to exploit the domination theory in view of its express denials of all the interveners' allegations of domination and control." This is without any justification. Subsequent to its answer to the intervener's complaint, petitioner filed a supplemental bill of complaint (R. 208) in which it alleged such domination and control for respondent's benefit and in entire disregard of petitioner's rights. This position was maintained throughout the trial and afterwards. The trial court quoted this allegation and said that it was sustained by a preponderance of the evidence. In the light of this record, respondent's assertion is not only without merit; it is inexplicable.

[13] He was its vice president, assistant secretary and assistant treasurer until April 30, 1945 (P. Ex. 2-A, chart), was in the retainer of its tax counsel until late in 1948, and at all times received a pension from it

The notion is sought to be conveyed that Mr. Curry managed and controlled tax matters for petitioner, when in fact he acted in a clerical capacity, as office manager, and as a "signing" officer who "signed whatever documents they told you to sign" (R. 642). The admitted competence with which he performed these limited functions did not make him into a directing figure, for in all other respects he was a "figurehead" (R. 646-7). During all the years of his connection with tax matters, they were put before him for signing after they were prepared by others over whom he had "supervision" only in the sense that he was office manager, and he had no real understanding of them (R. 807-9).

The truth is disclosed by memoranda passing between Mr. Coulson and Mr. Polk, respondent's tax attorneys. Mr. Coulson wrote:

> "Actually, I happen to know that the only person over at the Corporation office here in New York who has any knowledge of taxes is a girl who is primarily Schumacher's secretary" (R. 539).

Polk replied that "only the lady referred to had any part in the preparation of the return * * * Mr. Curry says they are too impoverished to hire accounting help." (R. 540; and see R. 823, 1403).

Nor is the competence of other officers or directors, much discussed by respondent, relevant. Mr. Schumacher was

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(O.B. 15, 22). Respondent would have it appear that its tax counsel retained Curry as an act of philanthropy to a retired man. Were it so, still the fact that the retainer had its roots in benevolence would not justify taking advantage of the relationship so as to use Curry as a tool to forward respondent's interests at petitioner's expense. Actually Curry was so retained, as respondent's counsel wrote, because "it seems to us essential that we have Mr. Curry available" for tax purposes, to be at tax counsel's "disposal in connection with the consolidated returns", and as soon as the statute of limitations had run against the government's reopening the tax settlement, Curry was given orders to vacate (O.B. 22, 23).

one of respondent's trustees. Mr. Nicodemus and Mr. Campbell, while holding the title of General Counsel for petitioner were at the same time attorneys for respondent and the trustees and received compensation from them but no compensation from petitioner (P. Ex. 2-A, chart). Judge Sloss had been petitioner's attorney on a specific assignment, to oppose the plan of reorganization. He had no other function, was interested in nothing else, knew nothing about the tax matter (R. 1603-5, 1611-14). Messrs. Wood and Osborn never knew until 1946 that petitioner's stock loss was being used in consolidated returns or were aware that it could be so used (O.B. 14). Mr. Nicodemus testified that he had no knowledge of the use of the loss (O.B. 142), but whatever his knowledge may have been it cannot affect petitioner's rights. He was only an attorney for it, and he was also an attorney for respondent. Even if petitioner's officers and directors had known of the use of its loss, had realized the legal and economic consequences, and with that knowledge had attempted to give away its rights, they could not bind it, because it was not represented by independent officers, and because any attempt to give away its rights without the consent of its stockholders would be beyond their powers.

For the same reason respondent's discussion of a casual conversation of Mr. Nicodemus with some attorneys who represented no parties in this case is pointless (Br. 27). The trial court dismissed the subject as irrelevant (R. 1075).[14] In fact, in that conversation Mr. Nicodemus did not have in mind the use of the stock loss (R. 1071).

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[14] It said (R. 1075-6):

"I do not see that when this witness learned about any of these things has any relationship to the question that you are presenting here. * * * I would much rather hear your arguments and all the arguments on the important and vital issues of this case than all this stuff about what conversations this witness had with some lawyer on a train going to Washington."

II

## THERE IS NO MERIT TO THE TECHNICAL ARGUMENTS BY WHICH RESPONDENT WOULD DEFEAT PETITIONER'S CLAIM THOUGH WHOLLY JUST.

### A. The Reorganization Proceedings Did Not Bar Petitioner's Claim.

Respondent asserts that "in the course of [the reorganization] proceedings the court effectually adjudicated that petitioner's claim was invalid and barred its assertion against the reorganized company" (Br. 93) and that it was "disallowed" (Br. 100). These unfortunate statements must have been made inadvertently. There was no adjudication and no disallowance. The claim was not even involved in those proceedings and was never brought to the court's attention.

The tax savings arose from acts occurring in their entirety after the plan of reorganiaztion was approved, consented to, confirmed and consummated. As Judge Fee said below (R. 2251):

> "Since the tax settlement between the Government and the corporation occurred after the decree in reorganization, there could be no res judicata."

Respondent also asserts that the trial court not only held that petitioner's claim was without merit but also that it "was in any event foreclosed by the failure to present it to the bankruptcy court" (Br. 19, 21). This is not so. One of the two reasons why the trial court held against petitioner's claim was its conclusion that it was a "circuitous way of obtaining something in the nature of equity or value for its ownership, rejected in the reorganization plan" (R. 272), a line of reasoning we have shown to be fallacious (O.B. 49-56). But the trial court did not

hold that the claim was barred for failure to present it. That argument, strenuously urged by respondent in both courts below, was adopted by neither.

We have shown (O.B. 131-133) that the contention is not valid for two separate reasons:

1. The claim arose after the revesting of the properties in respondent.

2. Respondent expressly assumed "all liabilities and obligations * * * arising out of the possession, use, or operation of the debtor's properties by said trustees, or their conduct of the debtor's business * * *" (R. 1711, 1713), and the court exempted from its bar order claims so assumed. This was pursuant to the principle that the purpose of reorganization proceedings is to discharge or readjust debts existing at their commencement, and that claims arising from acts of the court's officers are to be protected when proceedings are closed, consistently with discharge of personal liability of the court's officers.

Since the tax returns for 1944 and the claim for refund of 1942 taxes were prepared and filed after the revesting, respondent's arguments have no possible pertinence to them and are probably addressed to the saving of 1943 taxes.

To circumvent the fact that the claim arose after the revesting, respondent argues that "contingent" claims may be presented (Br. 102), and that the reorganization court must "consider and act upon all possible claims which might be asserted against the reorganized company" (Br. 90). But the kind of "contingent" claims that may be presented are such as arise out of contracts of the debtor in existence, or out of its acts occurring, at or before the time the bankruptcy commenced, certainly not claims which arise by reason of an enrichment of the party to whom the assets have been returned, occurring after the bankruptcy,

merely because the enrichment may in some way have its roots in acts of the trustees. What petitioner had, prior to the tax settlement of 1947, was not a contingent claim but merely a right to seek declaratory relief with respect to what would be the rights of the parties in the event that tax savings should arise in the future. *Maguire* v. *Hibernia Savings & Loan Society,* 23 Cal. 2d 719 at 734, 146 Pac. 2d 673.[15]

To escape the consequences of its express assumption of the trustees' liabilities and obligations, respondent argues that the trustees could not incur a liability except by express prior authorization of the Bankruptcy Court. But respondent's citations refer, at best, only to the enforcement of express contracts.[16] Whoever voluntarily chooses to enter into a contract with court officers may be bound to ascertain the scope of their authority, on the principle pertaining generally to agents. That principle does not apply to noncontractual obligations. Where a receiver is authorized to operate a railroad, the receivership

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[15] A suit for declaratory relief against a trustee may be maintained outside the Bankruptcy Court. *Gutensohn* v. *Kansas City Southern Railway Co.,* 140 F. 2d 950 (8 Cir.). *A fortiori,* if a cause of action for coercive relief subsequently arises, a party is not barred from presenting it to a federal court in equity merely because he had not presented a request for declaratory relief to the Bankruptcy Court at a time when he yet had no claim for coercive relief.

Respondent asserts (Br. 90) that reorganization must end all claims, but the cases cited relate to claims existing prior to the reorganization proceedings (e.g. *Duryee* v. *Erie R. Co.,* 175 F. 2d 58), or where express notice was given to present claims arising from the trustees' acts and there was no provision for assumption.

[16] The principal one, *Chicago Deposit Vault Co.* v. *McNulta,* 153 U. S. 554, does not even go that far. The question was as to the binding effect of an unauthorized long term lease for the portion of the term extending beyond the receivership. The Court commented (p. 563) that the lessor had been fully paid under the lease for the time "that its premises were occupied for the benefit of the trust" and recognized the right in equity of a party supplying something of value to the receiver to be compensated although there had been neither previous approval nor subsequent ratification.

does not escape liability for personal injuries resulting from negligence because the court did not authorize the receiver to commit the tort. It is equally unfounded to argue that a receiver may unilaterally take another's money, property, rights or other thing of value to the enrichment of the estate and yet not subject the enriched estate to liability unless the court had authorized the receiver to incur the liability.

Court officers are held peculiarly bound by obligations arising on principles of unjust enrichment, *Mosser* v. *Darrow,* 341 U. S. 267. No prior approval or authorization by the court to incur the liability is necessary: *In Re Hunter,* 151 Fed. 904; *Thompson* v. *Texas Mexican R. Co.,* 328 U. S. 134.

If a trust estate is enriched by the unauthorized acts of the trustee, the estate must account (*Restatement of Trusts,* Sec. 262; 2 *Scott on Trusts,* Sec. 269 to 269.3). If a trustee, not empowered to borrow money for the trust, nevertheless does so to pay taxes on trust property and so applies the funds, the estate is liable in equity to the lender (*Restatement,* Sec. 269, Comment a, Illustration 1). A leading case is Judge Cardozo's decision in *Whiting* v. *Hudson Trust Co.,* 138 N. E. 33, 234 N. Y. 394. Also *Central Trust Co. of New York* v. *Ohio Central R. Co.,* 23 Fed. 306.

While an unauthorized express contract may not bind the receivership, it will create a personal liability of the receiver, which courts strictly enforce. *Haines* v. *Buckeye Wheel Co.,* 224 Fed. 289, 297 (6 Cir.); *In re Erie Lumber Co.,* 150 Fed. 817; 1 *Clark on Receivers,* (2d ed), p. 527. Hence it is of no moment whether the liability was that of the trust or of the trustee personally, because by the Assumption Agreement respondent assumed all liabilities and obligations of the trustees in order that they might personally be exonerated.

### The Filing of the Return Using the Loss Was Authorized by the Bankruptcy Court

But in fact the trustees were authorized to do the acts from which the obligation to the petitioner arose. The authority to manage and conduct the business of the railroad (R. 1098) carried with it authority under *Internal Revenue Code*, Sec. 52, to file income tax returns in respondent's name. Before filing the 1943 return the trustees petitioned the court for authority to create the reserve fund (R. 1772), and on the hearing trustees' counsel explained their intention to file consolidated returns and to use petitioner's stock loss therein (R. 2023). The court then granted the petition (R. 616). Respondent argues that the "court considered the potential tax reduction was for the trustee's advantage" (Br. 104). This is gratuitous but also irrelevant. Being authorized to do what they did, the trustees were authorized to incur the legal and equitable consequences, whatever they were, and the resulting liability was assumed by respondent when it executed the assumption agreement.

### There is no limitation in the Assumption Agreement

Respondent further attempts to escape the express provisions of the Assumption Agreement by arguing that it did not thereby assume *all* obligations of the trustees but only some, that it did not assume "costs and expenses of administration", and that liability to the petitioner is such an expense. But the Assumption Agreement specifically provided that respondent assumed

> "generally any and *all* liabilities and obligations with respect to claims of any character *whether heretofore or hereafter asserted* arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business * * * ." (R. 1711, 1713).

Not only is this language comprehensive, it was so construed by the court by later order which found that respondent did assume "all" obligations of the trustees (R. 1988, quoted O. B. 136).

It would be difficult to draw an agreement which would more clearly include claims of the kind here advanced. No question appears to have been raised by respondent as to scope, when Messrs. Coulson and Polk on November 15, 1948 rendered their bill and were paid $300,000 "covering professional services in the tax disputes as to the taxable period January 1, 1942 through April 30, 1944", services which commenced in March 1943 during the reorganization (R. 1749).

Respondent urges that petitioner's claim, based on tax savings, is to be treated like the taxes (Br. 9). Yet both the Plan and the revesting order dealt with taxes in different paragraphs than they did expenses of administration. They provided for assumption of liability for taxes "whether or not proof thereof was made in said proceeding and without prejudice by reason of such proof not having been made" (233 I.C.C. at 455 and par. 9, Revesting Order, R. 49).

**Respondent's Fiduciary Relation to Petitioner Prevents a Destruction of the Claim**

Petitioner's tax affairs were managed by agents of the respondents and the trustees. Not until mid-1946 did any of petitioner's officers or directors know of the use of its stock lists except Mr. Schumacher, a trustee himself, and such as were acting for the trustees. Coulson and Polk who nominally acted as petitioner's counsel and held its power of attorney were employed and directed by the trustees and respondent and received their entire compensation from it. If claims had to be presented to protect petitioner's rights, it was their duty and that of the trustees

and respondent to present them. Respondent became petitioner's fiduciary and may not take advantage of its own delinquency to retain what does not equitably belong to it.

There is no "sacro-sanctity to bar orders", *Wheeling Valley Coal Co.* v. *Brady*, 159 F. 2d 155 at 159 (4 Cir.), and "even where an order of this sort is made, it does not follow that its binding effect is greater than needs dictate" (ibid, 157, quoting *Glenn on Liquidation*, p. 429).

### B. Statute of Limitations, Estoppel, Laches

Not only are the contentions that the petitioner's claim is barred by the Statute of Limitations, laches and estoppel not supportable in law, but respondent, because of its fiduciary relation, is also precluded from raising them as defences.

The defence of the Statute of Limitations is addressed only to the 1943 tax savings (Br. 107). The cause of action arose, not when the returns were filed, but when, by the settlement with the Treasury in 1947, the tax savings were effected (O.B. 132). This suit had already been filed in October 1946, and at that time was for declaratory relief preceding the accrual of the cause of action. *Maguire* v. *Hibernia Savings and Loan Association*, 23 Cal. 2d 719, 734, 146 Pac. 2d 673. Even if, as respondent contends, the claim arose while the trustees were in possession, respondent assumed it by the written Assumption Agreement, and the applicable statute is *Cal. Code of Civil Procedure, Section* 337(1), prescribing 4 years. *Sherwood & Sherwood* v. *Gill & Lutz*, 36 Cal. App. 707, 173 Pac. 171; *Anderson* v. *Calaveras Cent. Min. Co.*, 13 C.A. 2d 338, 342, 57 P. 2d 560.[17]

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[17] Even apart from the written assumption, the period would be 4 years under C.C.P., Sec. 343, generally applied to suits in equity (*Sherman* v. *S.K.D. Oil Co.*, 185 Cal. 534, 545, 197 Pac. 799), particularly fo

Respondent asserted no laches below. There can be no laches, for petitioner sued (1) within four months of its Board of Directors' learning of the use of its loss, and (2) before the tax settlement. Thus respondent could not possibly have been misled to its prejudice, and no one had relied on the Plan of Reorganization as giving the tax benefits to respondent (O.B. 49-56).

The claim of estoppel is based on the irrelevant past practice of filing consolidated returns. The cases cited (Br. 108) are cases where a party sought to place a new interpretation on a contract. There was no contract here between petitioner and respondent (See discussion at O.B. 124).

## III

## THE AMOUNT OF THE TAX SAVINGS

Arguing at length about the amount of the tax savings, respondent asserts that the courts below never decided the amount (Br. 109-115).

But they did. Respondent presented a quantity of evidence on this phase of the case, and the question was extensively briefed. Thereafter, in its opinion the trial court stated:

> "Operations of the debtor * * * were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some \$17,000,000 in income taxes" (R. 262) and the "net savings" or 'escape' [was] \$17,201,739" (R. 267).

The opinion concluded that it might serve as the findings but gave permission to counsel to propose findings (R. 276).

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an accounting (*Moss* v. *Moss*, 20 Cal. 2d 640, 644, 128 P. 2d 526; *McArthur* v. *Blaisdell*, 159 Cal. 604, 115 Pac. 52; *Austin* v. *Harry E. Jones*, 30 C.A. 2d 362, 368, 86 P. 2d 379), which lies to settle the rights and liabilities between all persons standing in fiduciary relations to each other (1 *Pomeroy, Equity Jurisprudence* (5th ed.) Sec. 186 (a), pp. 267-8).

Respondent took no exception to the above statements. The court then adopted its opinion as its findings (R. 319).

In its brief in the Court of Appeals, respondent asserted that the savings were less than $17 million, but that court in its opinion declared:

> "Except for the offset of the capital stock loss of the Corporation [petitioner] the taxes would have been some $17,000,000." (R. 2217-8).

Under the "two court rule" the finding concludes the issue. *Comstock v. Group of Institutional Investors*, 335 U. S. 211, 213, 214.

## CONCLUSION

We respectfully submit that the judgment should be reversed, with direction to remand to the District Court for entry of judgment for petitioner.

Dated: December 13, 1952

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